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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1035

NEW YORK SHIPPING ASSOCIATION, INC. and COUNCIL OF NORTH ATLANTIC SHIPPING ASSOCIATIONS,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

HOUFF TRANSFER, INC., TIDEWATER MOTOR TRUCK ASSOCIATION and DOLPHIN FORWARDING, INC.,

Intervenor-Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners New York Shipping Association, Inc. ("NYSA") and Council of North Atlantic Shipping Associations ("CONASA") pray that a writ of certiorari issue to review the judgment entered in this case on September 25, 1979 by the United States Court of Appeals for the District of Columbia Circuit.

Opinions Below

The opinion of the Court of Appeals is not yet reported officially.[1] A copy is reproduced as Appendix A in the separately bound appendix to this petition (App. A at 1a-74a).[2] The pertinent decisions and orders of the National Labor Relations Board ("NLRB" or "Board") are *International Longshoremen's Ass'n (Associated Transport, Inc.)* (App. B at 75a-98a) (hereinafter *"Associated Transport"*), which is reported officially at 231 N.L.R.B. 351 (1977) and unofficially at 96 L.R.R.M. 1636 (1977), and *International Longshoremen's Ass'n (Dolphin Forwarding, Inc.)* (App. C at 99a-116a) (hereinafter *"Dolphin"*), which appears officially at 236 N.L.R.B. No. 42 (1978) and unofficially at 98 L.R.R.M. 1276 (1978).

Jurisdiction

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on September 25, 1979. Petitions for rehearing *en banc* were denied on December 13, 1979 (App. H at 169a-178a). This petition is being filed within 90 days thereof. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

Statutes Involved

The relevant statutes, which are reproduced in the separately bound appendix (App. G at 166a-168a), are §§ 8(b)(4) and 8(e) of the Labor Management Relations Act, 1947, as amended ("LMRA"), 29 U.S.C. §§ 158(b)(4) and 158(e) (1976).

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[1] It has been unofficially reported at 102 L.R.R.M. 2361.

[2] References are to the pages of the separately bound appendix.

Question Presented

A grave conflict presently exists in the decisions of the NLRB and the courts with respect to the doctrine of work preservation. National labor policy as embodied in the doctrine of work preservation sanctions collectively bargained provisions preserving the traditional work of the protected unit employees from technological displacement. The fundamental threshold question in every work preservation case relates to the definition of the work in controversy—if it is equivalent to traditional unit work practices, it may lawfully be preserved or recaptured; if it is entirely new and unrelated work, it may not be acquired.

In many industries, technological innovation dislocates the work situs. It enables workers at other work sites to perform work identical or functionally equivalent to the traditional work practices of the protected unit.

The basic, but exceptionally important, question in this case is:

> Whether the Board may ignore the protected unit's traditional work practices, performed prior to the emergence of the technological innovation, by defining the work in controversy as that performed away from the protected unit's work situs because of the innovation, thus automatically precluding any opportunity for the unit employees to preserve their work?

Statement of the Case[3]

The Labor Controversy

This case arises from the turbulent history of a labor struggle that has raged in the shipping industry without

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[3] The underlying facts in this case are virtually identical to the facts in *International Longshoremen's Ass'n (Consolidated Ex-*

(footnote continued on following page)

interruption for the past 20 years. It is a classic chronicle of a labor union's efforts to exact from its members' employers contractual protection for the job security of its members, who were faced with a drastic loss of work opportunities because of technological job displacement (App. A at 12a-16a).

In the shipping industry the union, International Longshoremen's Association, AFL-CIO ("ILA"), has resisted the encroachments of advancing technology which has decimated the number of its members and diminished their work opportunities. The focus of contention has been the industry's increasingly prevalent use of large metal cargo containers to increase the efficiency of shipping operations by decreasing the need for the traditional piece-by-piece loading and unloading of ocean borne cargo by ILA represented longshoremen (App. A at 4a).

Historically, the work of longshoremen has not been limited to loading and unloading ships. As this Court determined in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977) and in *P. C. Pfeiffer Co.* v. *Ford*, 48 U.S.L.W. 4018 (Nov. 27, 1979) (No. 78-425), longshoremen physically handled the movement of all ocean borne cargo piece-by-piece from the hold of the steamship vessel to the tailgate of the pickup or delivery truck. This pattern of

(footnote continued from preceding page)

press, Inc.), 221 N.L.R.B. 956 (1975), *enf'd*, 537 F.2d 706 (2d Cir. 1976), *cert. denied*, 429 U.S. 1041 (1977) (U.S. No. 76-569) (hereinafter *"Conex I"*) and in *Consolidated Express, Inc.* v. *New York Shipping Ass'n*, 452 F.Supp. 1024 (D.N.J. 1977), *aff'd in part and rev'd in part*, 602 F.2d 494 (3d Cir. 1979), *petitions for cert. filed*, 48 U.S.L.W. 3001 (U.S. June 22, 1979) (Nos. 78-1902 and 78-1905) (hereinafter *"Conex II"*). These facts have been articulated in the petitions for certiorari filed in both *Conex I* and *Conex II*. *See*, Pet. for Cert. in *Conex I* (No. 76-569) at 4-11; Pet. for Cert. in *Conex II* (No. 78-1905) at 3-12. However, for the convenience of the Court, these facts are recapitulated in this petition.

work encompassed not only the physical stowage and discharge of the cargo into and out of the vessel's hold, but also all of the interrelated functions of receiving the cargo, sorting the cargo, piling it onto pallets for stowage, removing the cargo from pallets and storing the loose cargo on the waterfront terminal for ultimate delivery to the consignees (App. A at 4a, 42a-45a; App. B at 85a-86a; App. C at 126a).

Containerization radically changed this traditional method of cargo handling so that now hundreds of crates, packages and cartons, weighing more than 30,000 pounds could be loaded or unloaded onto or off of an ocean vessel without a single package being handled by the longshoremen. The result was a devastating loss of ILA work opportunities and manhours of employment, and a dramatic increase in dockside work productivity (App. A at 4a-5a; App. B at 86a).

The Port of New York was the birthplace of this dynamic container revolution which first had its advent there in the late 1950's (App. A at 12a). Although a few metal containers were in use, starting in 1965 or 1966, it was not until the early 1970's that containerization, as it is known today, first appeared in other Atlantic Coast ports, including the Ports of Hampton Roads and Baltimore (App. A at 7a). Thereafter, there was a dramatic increase in container traffic and by 1973, containerized cargo reached appreciable proportions in all major North Atlantic ports.

From the advent of containerization in the late 1950's to the present, ILA and the employers of its member-longshoremen have disagreed about the use of containers (App. A at 5a-16a). The shipping employers, through their collective bargaining representatives, CONASA, NYSA, Hampton Roads Shipping Association ("HRSA") and

Steamship Trade Association of Baltimore ("STAB")[4] have consistently taken the position that their containers should be permitted to move on and off the docks without any ILA imposed restrictions. Conversely, ILA has strenuously resisted the use of containers. It has argued, just as this Court has already held in *Northeast Marine* and *Pfeiffer*, that the container itself is a part of the hold of a steamship vessel and should be loaded and unloaded by ILA longshoremen piece-by-piece and package-by-package, as had been done traditionally.

The first contractual attempt to resolve the issue of containerization was the 1959 collective bargaining agreement between ILA and NYSA in the Port of New York (App. A at 13a; App. C at 102a). Hundreds of grievances, dozens of work stoppages and wildcat strikes by ILA during the succeeding 10 year period evidenced the inadequacy of the 1959 contractual solution (App. A at 6a-7a; 14a-15a). During this time ILA consistently demanded the right to load and unload ("stuff" and "strip") the cargo in the containers.

After the introduction of the first fully containerized vessel into the major North Atlantic trade in 1967 and the published plans by many shipping employers to embark upon full container operations, ILA renewed its demand to stuff and strip all containers in the 1968 collective bargaining negotiations (App. A at 14a). This demand was rejected and a 57-day strike ensued on the North Atlantic

[4] NYSA, HRSA and STAB are membership associations which act, on behalf of their members, as multi-employer collective bargaining representatives in the negotiation and administration of labor contracts with ILA. CONASA has represented constituent shipping associations, including NYSA, HRSA and STAB, in ports from Massachusetts to Virginia. Since its formation in 1970, CONASA has bargained with the ILA over certain key issues, including containerization, on a master-contract basis. Prior to the formation of CONASA, North Atlantic ports generally adopted the master terms of the labor agreement negotiated in the Port of New York (App. A at 6a; App. D at 124a-125a).

Coast (App. A at 6a, 15a).[5] The Presidential Board of Inquiry, established pursuant to the national emergency provisions of the Taft-Hartley Act, 29 U.S.C. § 171, *et seq.* (1976), reported that one of the issues separating the parties was the consequences of containerization. Under unrelenting strike pressure, and with the assistance of federal mediators appointed by the President of the United States, the shipping employers reluctantly reached agreement with ILA (App. A at 6a-7a, 15a). The resulting collective bargaining agreement, which was adopted in all North Atlantic ports, including New York, Baltimore and Hampton Roads, contained the Rules on Containers ("Rules")—essentially the same contractual provisions as those being challenged in the present case.

The Rules represented a compromise between labor and management on the containerization issue. This compromise permitted the overwhelming bulk, or more than 80% of the container traffic, consisting of containers loaded with the cargo of a single shipper or consignee who is the beneficial owner of the cargo ("full shippers' load" or "FSL"), to pass over the piers intact without any stripping or stuffing by ILA dockworkers.[6] However, the Rules provided that, if there is to be any loading or unloading of ocean borne cargo into or out of the shipping employers' containers within the local port area (other than by employees of the beneficial owner of the cargo), that work should continue to be performed by longshoremen at the piers, as it has traditionally. Thus, any export container which was loaded with the individual cargo lots of several shippers ("consolidated"), at a local off-pier facility lo-

[5] The strike continued for more than 100 days in other Atlantic and Gulf Coast ports (App. A at 6a).

[6] The Rules also exempted from pierside cargo handling any container originating at or destined to points 50 or more miles from the port (App. A at 15a).

cated within 50 miles of a port, was to be stripped and stuffed into a container at pierside by ILA longshoremen. The converse applied to an import consolidated container; its contents would be stripped at the pier, if it contained the shipments of several consignees and was destined for unloading at an off-pier facility within the local 50 mile port area (App. A at 15a).

Shortly after the Rules were formalized in the 1968 labor contract, their validity was upheld—first, under the LMRA by a Regional Director and General Counsel of the NLRB, and then under the antitrust laws by the United States Court of Appeals for the Second Circuit in *Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n,* 426 F.2d 884 (2d Cir. 1970) (hereinafter "*ICTC*") (App. A at 34a-35a).

In 1971, after another long strike of 56 days' duration, the resulting labor contract with the ILA, now negotiated by CONASA, left the 1968 Rules intact (App. A at 9a-10a). Despite the contractual formality of the Rules, ILA continued to assert that the shipping employers were permitting, if not encouraging, violations of the labor contract, thus depriving ILA members of their traditional work. Faced with the ILA strike threat to halt the movement of all containers if the Rules were not effectively enforced, the shipping employers capitulated in 1973 to an amendment to the collective labor contract, known as the Dublin Supplement, that was designed to eliminate the violations cited by ILA (App. A at 15a-16a).

In the Port of New York, the ILA's principal complaint was directed against the shipment of consolidated containers even though their contents had not been handled by ILA longshoremen at the docks as required by the Rules. To preclude this type of violation of the Rules, the Dublin Supplement expressly prohibited the shipping employers from releasing their containers to off-pier con-

solidation facilities. The shipping employers were to advise the consolidation companies to deliver their cargo lots to the pier where they would be physically loaded in the first instance into the shipping employers' containers by their own ILA longshore employees. Any import consolidated container was to be stripped at pierside and its contents picked up by the consolidator in uncontainerized form.

In Hampton Roads and Baltimore, the controversy between the ILA and the shipping employers centered upon imported FSL containers which, although destined for delivery intact to their consignees, were stopped short of their ultimate destination and stripped at warehouses or trucking stations within 50 miles of the port ("shortstopped containers") (App. A at 39a). The Dublin Supplement expressly reflected the longstanding and unequivocal understanding of both the ILA and the shipping employers that shortstopped containers lost their FSL identity, and were the equivalent of consolidated containers to be stripped at the piers (App. A at 11a). However, the ILA agreed in the Dublin Supplement to an exception from the pierside stripping requirements of the Rules for FSL containers destined for unloading at warehouses within the 50 mile port area, provided their contents were genuinely warehoused for the customary 30 day period (App. A at 11a; 39a; App. B at 88a).

The basic principles embodied in the 1968 and 1971 Rules and Dublin Supplement were codified in the Rules on Containers contained in the 1974 CONASA-ILA collective bargaining agreement (App. A at 11a-12a; 16a; App. B at 87a; App. D at 134a).

Containerization continues to this day to be a hotly contested and complex issue in longshore labor relations. The NLRB's initial invalidation in 1975 of the Rules in the Port of New York in *Conex I* disrupted the compromise resolution that had prevailed for almost a decade and in-

jected untoward uncertainty and confusion into the 1977 negotiations. Once again job security for longshoremen displaced by containerization was the principal bargaining issue. Once again the negotiations were marked by a major two month strike by longshoremen against container operators from Maine to Texas. The 20 year struggle over containerization continues unabated. It is likely to flare up again during the national longshore negotiations that will commence in the spring of 1980, especially in view of the conflicting decisions of the District of Columbia Circuit in this case and of the Second Circuit in the factually indistinguishable *Conex I*.

The Proceedings Below

A. Associated Transport

In 1974, two shipping employers, United States Lines and Lavino Shipping Company, were fined for violating the Rules on Containers in the Ports of Hampton Roads and Baltimore. Their containers had been shortstopped and stripped within the 50 mile port area at off-pier terminals operated by Associated Transport, Inc. and Houff Transfer, Inc., motor carriers engaged in interstate trucking operations, a minor portion of which has, since 1970, included the drayage of FSL containers. When Associated and Houff refused to reimburse the fines, the shipping employers rescinded the authority of these motor carriers to haul containers (App. A at 20a-21a; App. B at 93a-94a; App. D at 139a-142a).

Associated and Houff then filed unfair labor practice charges with the NLRB.[7] This initially set in motion two

[7] Charges were also filed by Tidewater Motor Truck Association, a membership association of motor carriers including Associated. Only Houff and Tidewater actively participated as intervenors in the Court of Appeals.

proceedings that ultimately resulted in the issuance of preliminary injunctions under LMRA § 10(l), 29 U.S.C. § 160(l) (1976), but only after diametrically divergent district court determinations on the same basic facts. *Compare Humphrey* v. *International Longshoremen's Ass'n,* 401 F. Supp. 1401 (E.D. Va. 1975), *rev'd,* 548 F. 2d 494 (4th Cir. 1977) (injunction denied in Port of Hampton Roads, but reversed on appeal) *with Humphrey* v. *International Longshoremen's Ass'n,* No. Y-75-1395 (D.Md. Mar. 25, 1976) (injunction granted in Port of Baltimore).

The charges were then litigated before an Administrative Law Judge who concluded, in strict reliance upon the earlier *Conex I* decision, that the Rules violated LMRA § 8(e), and that ILA's coercion of the shipping employers to enforce these contractual provisions violated the secondary boycott proscriptions of LMRA § 8(b)(4) (App. D at 117a-157a). A three member panel of the Board affirmed in a split opinion (App. B at 75a-98a).

B. Dolphin

In the Port of New York, the Rules were enforced in late 1974 and early 1975 against two shipping employers, Transamerican Trailer Transport, Inc. and Maritime Transportation Management, Inc. They were fined for permitting the shipment without pierside stripping and stuffing of containers consolidated off-pier by San Juan Freight Forwarders, Inc. and Dolphin Forwarding, Inc. These companies are engaged in the business of consolidating the individual cargo lots of various shippers by placing them into containers in preparation for ocean transport. When the shipping employers, in accordance with the Rules, refused to furnish off-pier access to their containers to Dolphin and San Juan, these consolidation companies filed unfair labor practice charges with the NLRB (App. A at 21a-22a).

An application by the NLRB for a preliminary injunction under LMRA § 10(l) was denied. *Danielson* v. *International Longshoremen's Ass'n,* No. 75 Civ. 4027 (S.D.N.Y. Sept. 18, 1975). The charges were then litigated before an Administrative Law Judge who struck all defenses (App. E at 158a-163a) and rejected virtually all defense evidence because he considered the case before him to be dispositively controlled by the earier *Conex I* decision (App. F at 164a-165a). An initial decision by the Administrative Law Judge was waived. Thereafter, the charges were transferred for decision to a panel of the Board which also expressly considered *Conex I* to be controlling (App. C at 99a-116a). It thus concluded that the Rules constituted a hot cargo agreement in violation of LMRA § 8(e), and that their enforcement by ILA against the shipping employers was proscribed secondary activity in violation of LMRA § 8(b)(4).

C. The Decisions of the Board

The Board's decisions in *Associated Transport* and *Dolphin* are virtually identical. In each case, the Board adjudicated the same fundamental question: whether the Rules are lawful work preservation provisions designed to preserve for longshoremen their traditional work functions which were threatened by technological displacement.

In each case, the Board's invalidation of the Rules, as an unlawful work acquisition agreement, did not result from the exercise of its fact finding powers. The facts in each case were undisputed. Instead, the Board's conclusion rested upon a fundamental error of law stemming from its adjudication of the elementary threshold issue present in every work preservation case, namely the definition of the work in controversy.

The Board, as it had in *Conex I,* defined the work in controversy by focusing exclusively on the off-pier stuffing and stripping of containers by consolidators' and motor

carriers' employees who had acquired this work as a result of the innovation wrought by containerization. In the Board's view, since the longshoremen's work jurisdiction has always been confined to waterfront facilities, they necessarily could not have traditionally performed the work in controversy, and, hence, by definition, the Rules must amount to an unlawful work acquisition device (App. B at 81a; App. C at 103a).

D. The Decision of the Court of Appeals

The Court of Appeals panel by a divided vote reversed and vacated the Board decisions. The majority concluded, as a matter of law, that the Board erroneously misinterpreted and misapplied the doctrine of work preservation formulated by this Court in *National Woodwork Manufacturers Ass'n* v. *NLRB,* 386 U.S. 612 (1967) and *NLRB* v. *Enterprise Ass'n of Steam, etc. Pipefitters,* 429 U.S. 507 (1977).

The majority principally disagreed with the Board's definition of the work in controversy. It found this definition to be legally defective since it had been constructed by completely ignoring the traditional work practices performed by longshoremen prior to the introduction of the technological innovation of containerization.[8] In the

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[8] The Board's error of law is especially pronounced in light of the fact that the Board completely overlooked the striking similarities between the traditional work practices of longshoremen and the work of stuffing and stripping containers. It refused to adopt the inescapable conclusion previously reached by this Court that stuffing and stripping containers is the functional equivalent of traditional longshore work practices. *Northeast Marine Terminal Co.* v. *Caputo,* 432 U.S. 249, 270 (1977), *aff'g, Pittston Stevedoring Corp.* v. *Dellaventura,* 544 F.2d 35 (2d Cir. 1976). *Accord, P.C. Pfeiffer Co.* v. *Ford,* 48 U.S.L.W. 4018 (Nov. 27, 1979) (No. 78-425); *Stockman* v. *John T. Clark & Son of Boston, Inc.,* 539 F.2d 264, 272, 275-77 (1st Cir. 1976), *cert. denied,* 433 U.S. 908 (1977); *see also, Leather's Best, Inc.* v. *S.S. Mormaclynx,* 451 F.2d 800, 815 (2d Cir. 1971).

majority's view, the Board's analysis thus failed to examine "all of the surrounding circumstances" prescribed in *National Woodwork* and *Enterprise* and, if allowed to prevail, would virtually obliterate the doctrine of work preservation:

> This formulation of the work in controversy, however, could not reasonably have been based on 'all the surrounding circumstances' as required by *National Woodwork* and *Pipefitters*. When a technological innovation is introduced in the workplace, new work may be created and may initially be performed, as in these cases, by employees other than those who worked with the old technology. The crucial question is how best to rationalize the work that results from the innovation into traditional work patterns. As a rule, this cannot be done by ignoring those traditional work patterns when defining the work in controversy. But that is precisely what the NLRB has done here. Rather than define a category of work based on work patterns both prior and subsequent to the innovation, the Board has defined the work in controversy specifically in terms of the innovation, thus *by definition* removing any opportunity for pre-innovation workers to preserve their work. Under such a formulation the Supreme Court's work preservation doctrine is sapped of all life.

(App. A at 41a-42a; emphasis in original and footnotes omitted).

The Court of Appeals also exposed two other fatal legal flaws in the Board's decisions. Each involved a basic misapplication by the Board of a key work preservation principle established by this Court in *National Woodwork* and *Enterprise*. The first related to the "touchstone" of analysis sculptured by the *National Woodwork* Court for every work preservation case, namely, whether

the challenged agreement or its implementation is addressed to the labor relations of the contracting employers *vis-a-vis* their own employees. 386 U.S. at 645. Conspicuously absent in this case was any organizational or other secondary purpose on the ILA's part with respect to the labor relations of the motor carriers or consolidators. Nevertheless, as the Court of Appeals panel concluded, the Board erroneously discounted this critical element of valid primary work preservation activity (App. A at 46a-48a).

The second defect uncovered by the majority of the Court of Appeals panel was the Board's disregard of another key work perservation principle, namely, the Board's own right of control test sanctioned by this Court in *Enterprise*. The Board simply failed to take into account the contracting shipping employers' power of control to assign the disputed container stuffing and stripping work to their own ILA represented longshore employees—another crucial element of a lawful, primary work preservation clause (App. A at 49a-50a).

In essence then, the Board is following a decision-making course, first embarked upon in *Conex I*, in which it has improperly departed from the elementary principles of this Court's work preservation doctrine. If left unchecked, the effect of the Board's errant departure could be the demise of the work preservation doctrine. The Court of Appeals for the District of Columbia Circuit has exposed the fundamental legal errors being committed by the Board. In so doing, it has irreconcilably disagreed with the Second Circuit's decision in *Conex I* and with the decisions of other circuits.

Petitioners respectfully submit that the District of Columbia Circuit's determination in this case is the only legally correct decision and that the previous adjudications by the Board and other circuits are in error. The pro-

found judicial disagreement that now exists has created confusion and uncertainty in longshore labor relations. It is likely to have a marked disruptive influence on the forthcoming national collective bargaining negotiations that will soon commence in 1980 in the longshore industry on the North Atlantic, South Atlantic and Gulf Coasts of the United States. It is for this reason that petitioners ask this Court to invoke its reviewing authority in this case to remove the sharp legal conflict by issuing a definitive determination regarding the lawfulness of the Rules on Containers under federal labor law.

Reasons for Granting the Writ

1. Substantial and Novel Questions of Federal Labor Law

This case presents substantial questions of federal law involving the basic elements of the doctrine of work preservation. The principal legal error committed by the Board in its definition of the "work in controversy" relates to the recurring, threshold issue present in every work preservation case. The Court of Appeals panel that decided the merits underscored the significance and substantiality of this basic federal labor question.[9] In its view, if the Board's definition were to prevail, "the Supreme Court's work preservation doctrine is sapped of all life" (App. A at 42a; footnote omitted).

The Board's erroneous reformulation of the work preservation doctrine also seriously frustrates the fundamental aspect of national labor policy upon which this doctrine is founded. Congress has expressly chosen a national regime in which "[a]s with most other aspects of American industrial relations, the problem of technological

[9] It is also significant that the four (4) Circuit Judges, who dissented from the denial of rehearing *en banc*, considered the case worthy of review by the full circuit court (App. H at 169a-174a).

innovation has been left to the system of private ordering we know as collective bargaining" (App. A at 5a; footnote omitted). The Board's approach, if left undisturbed, stands as a stark warning to any union faced with the demand to permit innovation, that it does so at its peril. No employer or union sitting down to bargain collectively on the subject of work preservation and job security could possibly know in advance whether the resulting labor agreement would prevail if the Board may have unbridled discretion to undo the bargain by the imperfect and purely subjective device of defining the work in controversy "in terms of the innovation" (App. A at 41a). Different and arbitrary results would prevail from industry to industry, from employer to employer, from work function to work function, from case to case. Forward looking collective compromises would be thwarted. Instead, there would be a reversion to economic warfare as labor unions would become "obdurate when asked to compromise some degree of job security for the sake of efficiency if that compromise might later be cast aside" (App. A at 30a).

The Court of Appeals panel appreciated the substantial importance of the labor law questions in this case and the far reaching nationwide ramifications of the Board's errors. The majority opinion was over 65 pages in length and it is perfectly apparent from the opinion that the majority considered it essential to undertake an extensive therapeutic treatment of the Board's erroneous misapplication of the work preservation doctrine. Chief Judge J. Skelly Wright of the District of Columbia Circuit meticulously reviewed and analyzed (1) the factual background surrounding the formulation and development of the Rules on Containers; (2) the fundamental legal principles embodied in the doctrine of work preservation; (3) the extended history of litigation involving the legality of the Rules on Containers under both federal labor law and federal antitrust law; and (4) the crucial legal errors contained in the Board's adjudications in this case.

2. The Work Preservation Doctrine—Irreconcilable Conflict In The Circuits

The decision of the Court of Appeals is important not only because of the significant federal labor law questions addressed, but also because the majority opinion on these questions is in direct conflict with determinations reached by other circuit courts. The majority's determination that the collectively bargained Rules are lawful work preservation provisions under federal labor law irreconcilably conflicts with the earlier split decisions of the Second Circuit in *Conex I* (Feinberg, J., dissenting) and of the Fourth Circuit in *Humphrey* v. *International Longshoremen's Ass'n*, 548 F.2d 494 (4th Cir. 1977) (Craven, J., dissenting).[10]

Conex I involved virtually the same operative enforcement of the same Rules in the Port of New York against two other off-pier consolidation companies, who, like the charging parties in the *Dolphin* phase of this case, were engaged in the off-pier consolidation of ocean borne cargo in the New York to Puerto Rico trade. To reiterate, the Second Circuit in *Conex I* held that essentially the same prohibitions, found lawful by the Court of Appeals in this case, violated the hot cargo and secondary boycott proscriptions of the federal labor statutes. The Fourth Circuit in *Humphrey* scrupulously adhered to the *Conex I* determination in issuing preliminary injunctive relief in the LMRA § 10(l) proceeding underlying the *Associated Transport* phase of this case.

Both the Second and Fourth Circuits perfunctorily deferred to the fact finding expertise of the Board. However,

[10] A conflict may also exist with the First Circuit's decision in *International Longshoremen's Ass'n, Local 1575* v. *NLRB*, 560 F.2d 439 (1st Cir. 1977), although, as the majority of the District of Columbia Circuit panel recognized in this case, there are significant factual distinctions between these two cases. *See*, App. A at 37a-38a.

the majority in the case at bar expressly rejected the other circuits' *ratio decidendi* since the facts in all of these cases involving the Rules are admittedly undisputed. The majority pointed out that its disagreement with the Board and other circuits exclusively rests upon what it considered to be the "erroneous legal foundations"[11] of the Board's adjudications (App. A at 52a).

The Board's novel and unprecedented definition of the work in controversy injects an impractical, unduly subjective and potentially arbitrary standard into the work preservation doctrine. It directly conflicts with *National Woodwork*. If the *National Woodwork* Court had adopted the Board's definition of the work in controversy "in terms of the innovation", *i.e.*, the work on prefit doors at the door manufacturers' plants, it would have been impelled to reach a completely different result by invalidating the clause, which prohibited the use of such prefit doors at construction sites, since by definition the boycotting carpenters did not perform any work on the prefit doors away from the construction site.

The Board's definition is also contrary to the rulings in every case that has considered the issue of work preservation since *National Woodwork* with the exception of the split decisions in *Conex I* and *Humphrey* and possibly the First Circuit's determination in *Local 1575*. It represents a significant departure from the prevailing definition of the work in controversy embraced by these other courts. *See, Enterprise; Houston Insulator Contractors Ass'n* v. *NLRB*, 386 U.S. 664 (1967); *Sheet Metal Workers Local 223* v. *NLRB*, 498 F.2d 687 (D.C. Cir. 1974); *Local 742, United Bro. of Carpenters & Joiners* v. *NLRB*, 444 F.2d 895 (D.C. Cir.), *cert. denied*, 404 U.S. 986 (1971); *ICTC; Canada Dry Corp.* v. *NLRB*, 421 F.2d 907 (6th Cir. 1970);

[11] *NLRB* v. *Brown*, 380 U.S. 278, 290-92 (1965); *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956).

American Boiler Manufacturers Ass'n v. *NLRB*, 404 F.2d 547 (8th Cir. 1968), *cert. denied*, 398 U.S. 960 (1970); *NLRB* v. *Local 164, IBEW*, 388 F.2d 105 (3d Cir. 1968); *NLRB* v. *Local 28, Sheet Metal Wkrs. Int'l Ass'n*, 380 F.2d 827 (2d Cir. 1967); *cf., Electro-Coal Transfer Corp.* v. *General Longshore Wkrs. Local 1418*, 591 F.2d 284 (5th Cir. 1979); *Frito-Lay, Inc.* v. *Retail Clerks Local 7*, 452 F. Supp. 1381 (D. Colo. 1978).[12]

Review of the fundamental labor law issues in this case will enable this Court to resolve the sharp conflict in the circuits concerning the correct definition of the work in controversy and the other appropriate principles to be applied to challenged work preservation clauses, and the consequences of the chosen standards upon the proper accommodation between the doctrine of work preservation and the national labor policy favoring the peaceful resolution, through collective bargaining, of labor disputes, including job security problems occasioned by technological displacement. 29 U.S.C. § 151 (1976).[13]

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[12] *See also, Meat and Highway Drivers, Local 710* v. *NLRB*, 335 F.2d 709 (D.C. Cir. 1964); *Local 98, Sheet Metal Wkrs. Int'l Ass'n* v. *NLRB*, 433 F.2d 1189 (D.C. Cir. 1970) (Wright, J., dissenting).

[13] This Court's resolution of the labor law aspects of this case will have an immediate impact upon several adjudicatory proceedings now pending in other circuits and before the NLRB involving the legality of the Rules on Containers. In these cases, the Board is scrupulously following the erroneous definition of the work in controversy first fashioned in *Conex I* and rejected by the Court of Appeals in this case. *See, International Longshoremen's Ass'n (Beck Arabia, Ltd.)*, 245 N.L.R.B. No. 172 (Sept. 28, 1979), *appeal docketed*, No. 79-1672 (4th Cir. Oct. 16, 1979) (Board decision invalidating enforcement of the Rules in the Port of Baltimore); *International Longshoremen's Ass'n Local 1408 (Puerto Rico Marine Management, Inc.)*, 245 N.L.R.B. No. 171 (Sept. 28, 1979), *appeal docketed*, No. 79-3444 (5th Cir. Oct. 16, 1979) (Board decision invalidating enforcement of the Rules in the Port of Jackson-

(footnote continued on following page)

3. Important Interrelated Antitrust Aspects—The Doctrine of Labor Exemption And The Rule Of Reason

This accommodation will also have a significant and material bearing upon the overlapping policy of federal antitrust law. Indeed, this case is intimately related to a companion antitrust/labor case now pending before this Court. *Conex II*.[14]

The earlier adjudications by the Board and Second Circuit in *Conex I* constituted the predicate for the Third Circuit's judgment in *Conex II*. Through the invocation of the doctrine of collateral estoppel, the Third Circuit automatically imposed LMRA § 303, 29 U.S.C. § 187 (1976), liability against ILA for its enforcement of the Rules on Containers. Within the same context, it also formulated a novel, unprecedented and unduly onerous test that must be satisfied by both the ILA and the shipping employers before they will be entitled to the protective aegis of the non-statutory labor exemption from antitrust liability.

(footnote continued from preceding page)

ville); *International Longshoremen's Ass'n (Terminal Corp)*, Nos. 5-CC-925 and 5-CC-929 (Dec. 11, 1979) (Administrative Law Judge's initial decision invalidating the Rules in the Port of Baltimore in which it was held that, despite the decision of the Court of Appeals in this case, the Administrative Law Judge was compelled to adhere to contrary Board authority); *International Longshoremen's Ass'n, Local 1410 (Custom Brokers, Inc.)*, No. 12-CE-30 (pending proceeding before Administrative Law Judge involving challenge to the Rules in the Port of Miami), *Local 1242, International Longshoremen's Ass'n (Hill Creek Farms, Inc)*, Nos. 4-CC-1133 and 4-CE-55 (pending proceeding before Administrative Law Judge involving challenge to the Rules in the Port of Philadelphia).

[14] The Solicitor General has filed an *amicus curiae* brief in *Conex II* in response to this Court's October 9, 1979 invitation in which the United States suggests that this Court's review of the case *sub judice* could directly and fundamentally affect *Conex II*.

Absent this exemption, the enforcement of the Rules would, in the opinion of the majority of the Third Circuit panel, constitute a *per se* violation of §§ 1 and 3 of the Sherman Act, 1890, as amended, 15 U.S.C. §§ 1 and 3 (1976), for which treble damages and injunctive relief would be available under §§ 4 and 16 of the Clayton Act, 1914, as amended, 15 U.S.C. §§ 15 and 26 (1976), since the Third Circuit majority rejected the necessity for any rule of reason antitrust analysis.[15]

Contrary to the decision in *Conex I*, the Court of Appeals in this case has now determined that the same Rules on Containers are not only lawful under federal labor law but also

> represent a reasoned response to the difficult problem of technological innovation and are an exemplar of the self-government contemplated by Congress when it left the bulk of industrial problems to be resolved in the private sector . . . Courts and the NLRB must take great care not to disturb the parties' reasoned attempts at self-governance unless those attempts contravene the law. For the reasons stated in this opinion, we believe that the NLRB has failed to demonstrate that the Rules on Containers and action seeking to enforce the Rules are in contravention of the law.

App. A at 53a-54a; footnotes omitted.

Certainly the views expressed by the majority of the District of Columbia Circuit in this case are in irreconcilable conflict with the Third Circuit's judgment in *Conex*

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[15] In the same fashion as *Conex II*, the Board litigations in this case have spawned actions under the antitrust laws and under LMRA § 303. *See, Houff Transfer, Inc.* v. *International Longshoremen's Ass'n*, No. T-74-1336 (D.Md. filed Dec. 5, 1974) and *Dolphin Forwarding, Inc.* v. *New York Shipping Ass'n*, No. 79-276 (D.N.J. filed Jan. 13, 1979).

II that enforcement of the same Rules may well expose ILA and the shipping employers to treble damages under the antitrust laws. This decision highlights the national importance of the intertwined labor/antitrust issues presented by the Rules on Containers and their enforcement.[16] It is the latest illustration of the sharp judicial discord which has arisen in the circuits. It underscores the need for this Court's review of these exceptionally important issues.

4. Furtherance of the Public Interest—National Scope and Importance of This Case

The resolution of the present conflicting state of the law will directly and materially prevent volatile labor-management confrontations in a vital national industry. It is thus within the public interest for this Court to accept this case for review.

The settlement embodied in the Rules resulted from more than two decades of hard bargaining and contending economic pressures, which produced lengthy longshore strikes in 1959, 1962, 1964, 1968, 1971, 1975 and 1977. This settlement had received the *imprimatur* of both the executive and judicial branches (App. A at 6a-7a). *See, ICTC.* However, in 1975, many years after the initial adoption of

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[16] Federal shipping policy is also a relevant ingredient to be added to the blend of federal antitrust and labor policies. Certain shipping employer tariffs, which incorporated verbatim the Rules on Containers, have been declared unlawful by the Federal Maritime Commission under §§ 14 Fourth, 16 First and 18(a) of the Shipping Act, 1916, as amended, 46 U.S.C. §§ 812, 815 and 817 (1976), and § 4 of the Intercoastal Shipping Act, 1933, as amended, 46 U.S.C. § 845a (1976). *Sea-Land Service, Inc. and Gulf Puerto Rico Lines, Inc.—Proposed Rules on Containers and Puerto Rico Maritime Shipping Authority—Proposed ILA Rules on Containers,* FMC Docket Nos. 73-17 and 74-40 (June 14, 1978), *appeal docketed sub nom. Council of North Atlantic Shipping Associations and New York Shipping Ass'n* v. *FMC,* No. 78-1776 (D.C. Cir. Aug. 9, 1978).

the Rules, they were declared invalid in *Conex I* and the parties were once again forced to grapple with the thorny problems of technological displacement.

The succeeding 1977 negotiations were unduly complicated by the parties' struggle for a viable alternative to fill the critical gap created by the invalidation of the Rules. An inevitable impasse was reached. The ensuing lengthy strike on the East and Gulf Coasts had a harmful and irreparable impact upon the national economy. To this day, it has still not recovered from the disastrous deficit in the foreign balance of payments caused by the strike.

The potential for labor strife in the forthcoming 1980 longshore negotitations has been immeasurably enhanced by the incompatible decisions in *Conex I* and in this case. Undoubtedly, the uncertainty and confusion wrought by these discordant circuit court decisions will engender untoward difficulties in reaching a collectively bargained accord.

The ramifications nationwide of the irreconcilable conflict in the circuits relating to the elementary principles of the work preservation doctrine upon future collective bargaining negotiations, including those that will soon commence in the Spring of 1980 in the longshore industry on the Atlantic and Gulf Coasts, strongly support the need for this Court's review. This case presents an opportunity for this Court (1) to review exceptional federal questions of national importance, which it has not yet addressed, (2) to reconcile the conflicting interpretations by the lower courts of this Court's doctrine of work preservation and its prior decisions in *National Woodwork* and *Enterprise,* and (3) to establish an appropriate and pragmatic accommodation, within the context of the complex and highly sensitive interplay of federal labor, antitrust and shipping policies, between the doctrine of work preservation and the national labor policy favoring collective bargaining as the medium for the peaceful resolution of industrial disputes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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December 31, 1979

Respectfully submitted,

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